BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM TRAVIS TOMMER	)	
Claimant	)	
VS.	)	
	)	
BRADFORD BUILT, INC.	)	
Respondent	)	Docket No. 1,065,997
AND	)	
	)	
TRAVELERS CASUALTY AND SURETY COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the August 9, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Bryce D. Benedict of Topeka, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 9, 2013, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant was injured on May 27, 2013, when the skid loader he was operating tipped over. He was not wearing the seat belt/shoulder harness. Claimant asserts the seat belt/shoulder harness was not operating properly and respondent instructed him to sit on the buckled seat belt/shoulder harness or at least condoned him doing so.

Respondent asserts claimant violated company safety policies by driving the skid loader forward down an incline and not wearing the seat belt/shoulder harness. Therefore, pursuant to K.S.A. 2012 Supp. 44-501(a)(1), claimant should be denied compensation.

The ALJ denied claimant compensation, stating in the preliminary hearing Order:

> Claimant's preliminary hearing requests are **CONSIDERED** but **DENIED**. Claimant's injuries were suffered as a result of his willful failure to use a reasonable and proper guard and protection (seat belt and shoulder harness) voluntarily furnished by the employer. Claimant's argument that he defeated the safety features associated with the seat belt and shoulder harness is disingenuous. If, as Claimant contends, the skid loader was prone to sudden hydraulic failure and shutdown, he would have been more likely to avoid injury from a sudden stop if properly restrained. Defeating the safety belt and shoulder harness interlock rendered him more unsafe and unprotected from injury.[1]

The issues before the Board are:

1. Did claimant willfully fail to use a reasonable and proper guard and protection, the seat belt/shoulder harness, voluntarily furnished by respondent or recklessly violate respondent's workplace safety rules or regulations?

2. If so, was it reasonable under the totality of the circumstances for claimant not to use the seat belt/safety harness, or did respondent approve claimant operating the skid loader without wearing the seat belt/safety harness?

3. Did claimant recklessly violate respondent's safety rules by driving the skid loader forward down an incline?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant worked for respondent on two separate occasions, in 2009 and again beginning in 2012. He became a certified forklift operator when he worked for respondent in 2009. To become certified as a forklift operator, claimant completed a training program and passed a written test. He was trained to operate the forklift by Robin Fickbohm, the shop manager. Claimant denied being given an operational test on the forklift, but respondent introduced a forklift operator certification test signed by Mr. Fickbohm. Claimant denied receiving any training to operate a skid loader.

On May 27 or 28, 2013, Mr. Fickbohm tasked claimant with using the skid loader to move five loads of sheet metal. Moving the loads required claimant to go down a three-foot incline. Mr. Fickbohm testified that claimant moved the first four loads of sheet metal without incident in a safe and approved manner. Claimant testified the accident occurred while he was moving a fifth load of sheet metal. Claimant did not go out of the shop door backwards as he usually did. Because of the three-foot incline, the nose of the skid loader

[1] ALJ Order at 1.

dove to the ground. Claimant was not wearing the one-piece seat belt /shoulder harness and was ejected upward into the roof of the cab and injured his shoulders, neck and low back. Claimant felt he would have been injured even if he had been wearing the seat belt, as he is 6'6" tall and would have struck the console above him.

According to claimant, there was a problem with the seat belt on the skid loader in that the hydraulics locked up if the seat belt was being worn by the operator. To avoid the hydraulics from locking up, the seat belt was buckled so the operator could sit on it. The operator would then "lock" the seat belt in, by pushing a button down, so the skid loader would operate. Claimant testified he was shown how to operate the skid loader without wearing the seat belt by Justin Keeling, another employee. Claimant indicated the seat belt had been defective when he started working for respondent in 2012 and that employees routinely operated the skid loader while sitting on the buckled seat belt.

It was claimant's belief that the skid loader would not have operated safely and would have been damaged if the skid loader operator buckled the seat belt around his or her waist. Claimant indicated he had been told by Mr. Fickbohm there was nothing wrong with the skid loader and was unaware Mr. Fickbohm had adjusted the seat safety interlock. Claimant testified he was not trying to do anything unsafe when he sat on the seat belt instead of buckling it around his waist. He never was reprimanded in writing for not buckling the seat belt around his waist. Claimant testified that if he had operated the skid loader incorrectly, Mr. Fickbohm would have given claimant a verbal warning. Nor was claimant ever given a written reprimand for not using a seat belt while operating the skid loader. However, claimant acknowledged Mr. Fickbohm would not be able to see if the skid loader operator was wearing the seat belt/shoulder harness.

Mr. Fickbohm testified that a forklift and skid loader are both used to carry loads. Only the rear wheel or wheels on a forklift are used to steer. All four wheels on a skid loader are used to steer. On a skid loader, a lever is pushed so the front wheels go forward and another lever is pulled to make the back wheels reverse, causing the wheels to skid, which in turn steers the skid loader.

Mr. Fickbohm maintained the skid loader that claimant was operating when he was injured. The skid loader has a seat belt/shoulder harness. It has a safety sensor in the seat to detect if someone is sitting in the seat and a seat belt latch sensor. Once both sensors are activated, the skid loader will operate. If the seat safety interlock is not properly adjusted, it locks up the hydraulics on the skid loader without killing the motor, thus causing the vehicle not to respond to input commands. In turn, the vehicle suddenly stops. Mr. Fickbohm believed that some employees ran the skid loader too fast, causing them to bounce out of the seat, which in turn caused the skid loader's hydraulics to quit operating. In March 2013, Mr. Fickbohm adjusted the seat safety interlock because of complaints that it was not working correctly from claimant and another employee, Jason Carter.

Mr. Fickbohm testified that if claimant had gone backwards with the fifth load the accident would not have happened. It was Mr. Fickbohm's opinion that claimant would not have been injured had he been wearing the seat belt/shoulder harness. Mr. Fickbohm testified claimant violated two policies by not operating the skid loader correctly and not wearing the seat belt. Prior to the accident, Mr. Fickbohm had never seen claimant operate the skid loader without wearing the seat belt/shoulder harness. Mr. Fickbohm testified:

> Q. (The Court) Okay. Are you aware of any common practice within the shop for employees to defeat the safety devices by locking the seat belt and sitting on it?
>
> A. (Mr. Fickbohm) I knew it had been done.
>
> Q. When did you know it had been done and by whom?
>
> A. Almost everybody in the shop is guilty of it at one point or another.
>
> Q. What happened when you found out that people were doing it?
>
> A. I told them, don't do it, there's no reason for this. Well, it doesn't work any other way. Well, it does.[2]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[4]

K.S.A. 2012 Supp. 44-501(a) states:

> (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> (A) The employee's deliberate intention to cause such injury;

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[2] P.H. Trans. at 74.

[3] K.S.A. 2012 Supp. 44-501b(c).

[4] K.S.A. 2012 Supp. 44-508(h).

> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
>
> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
>
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or
>
> (E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.
>
> (2) Subparagraphs (B) and (C) of paragraph (1) of subsection (a) shall not apply when it was reasonable under the totality of the circumstances to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

Claimant indicated that he intentionally did not use the seat belt/shoulder harness on the skid loader. However, claimant's brief asserts that he did not willfully fail to use the seat belt/shoulder harness. As used in this context, the Kansas Supreme Court in *Bersch*[5] and the Kansas Court of Appeals in a much more recent decision in *Carter*[6] have defined "willful" to necessarily include:

> . . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.' [Citations omitted.][7]

The mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.[8] Although claimant may have violated respondent's safety rules by not wearing the seat belt/shoulder harness while operating the skid loader, that alone is not enough to render claimant's action as a matter of law "willful." There is insufficient evidence to establish claimant's failure to use the safety equipment was without yielding to reason, obstinate or perverse. Accordingly, this Board Member finds that under K.S.A. 2012 Supp. 44-501(a)(1)(C), claimant did not willfully fail to use the seat belt/shoulder harness.

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[5] *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

[6] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[7] *Id.* at 85.

[8] *Thorn v. Zinc Co.*, 106 Kan. 73, 186 Pac. 972 (1920).

Less clear is whether it was reasonable under the totality of the circumstances for claimant not to use the seat belt/shoulder harness, or if respondent approved claimant operating the skid loader without using the seat belt/safety harness. As stated above, claimant testified that he was shown how to operate the skid loader without wearing the seat belt/shoulder harness. He indicated the seat belt had been defective when he started working for respondent in 2012 and that employees routinely operated the skid loader while sitting on the buckled seat belt. Mr. Fickbohm testified he was aware of employees sitting on the seat belt and locking it.

This Board Member finds that under the totality of the circumstances, it was reasonable for claimant to operate the skid loader without wearing the defective seat belt/shoulder harness. There is nothing in the evidence to indicate that claimant was informed by Mr. Fickbohm that the seat safety interlock was repaired. If the seat safety interlock malfunctioned while the skid loader was operating, it would suddenly stop, which is unsafe. Moreover, all employees, on at least one occasion, operated the skid loader without properly using the seat belt/safety harness. This Board Member finds credible claimant's testimony that he was shown how to operate the skid loader without using the seat belt/shoulder harness.

Respondent also asserts claimant recklessly violated company safety rules by not using the seat belt/shoulder harness and driving the skid loader forward, instead of in reverse, down the incline. Claimant received forklift training in 2009, but testified he never received training on the skid loader. The written training program of respondent indicates the operator should transport the load in reverse if his or her vision is impaired, but does not indicate the forklift or skid loader should be operated in reverse down an incline. Claimant negligently drove the skid loader down the incline. However, respondent failed to prove as required by K.S.A. 2012 Supp. 44-501(a)(1)(D), that claimant acted recklessly when he drove the skid loader forward down the incline.

In *Mahathey*,[9] a Board Member concluded recklessness contemplates something beyond ordinary negligence or carelessness. The preponderance of the credible evidence must support a conscious disregard of a known or obvious risk that exceeds negligence. Recklessness is akin to gross, culpable or wanton negligence. Claimant testified it was safer to operate the skid loader without using the seat belt/safety harness. Claimant believed that if he wore the seat belt/safety harness and the seat safety interlock failed, the skid loader's hydraulics would suddenly stop, which would damage the skid loader, the materials and himself. There was a rational basis for claimant's belief that using the seat belt/safety harness created a greater safety risk than not doing so. This Board Member finds that respondent failed to prove that claimant recklessly violated respondent's safety rules by not wearing the seat belt/shoulder harness.

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[9] *Mahathey v. American Cable & Telephone, LLC*, No. 1,060,756, 2012 WL 5461478 (Kan. WCAB Oct. 8, 2012).

In summary, this Board Member finds: (1) claimant intentionally did not use the seat belt/safety harness, but his actions were not willful, (2) pursuant to K.S.A. 2012 Supp. 44-501(a)(2), under the totality of the circumstances it was reasonable for claimant not to use the seat belt/shoulder harness and that respondent, explicitly and through its actions, approved claimant's operation of the skid loader without using the seat belt/shoulder harness, and (3) respondent failed to prove as required by K.S.A. 2012 Supp. 44-501(a)(1)(D), that claimant acted recklessly when he drove the skid loader forward down the incline.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

WHEREFORE, the undersigned Board Member reverses the August 9, 2013, preliminary hearing Order entered by ALJ Moore and remands this matter to ALJ Moore to determine what workers compensation benefits claimant is entitled to receive.

IT IS SO ORDERED.

Dated this ____ day of October, 2013.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Bruce E. Moore, Administrative Law Judge

[10] K.S.A. 2012 Supp. 44-534a.

[11] K.S.A. 2012 Supp. 44-555c(k).